Heeft Israël het recht zichzelf te verdedigen?

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Door Marko Milanovic 14 november 2023

Dit is een bedrieglijk eenvoudige vraag. Er zijn verschillende mogelijke antwoorden, die elk gebaseerd zijn op verschillende (en zeer omstreden) aannames. In dit bericht zal ik proberen uit te leggen wat deze mogelijke antwoorden zijn en wat de implicaties ervan zijn. Ik weet zelf niet wat het 'juiste' antwoord hier is. Het is niet mijn bedoeling om er een te bepleiten. Ik moet niet worden opgevat alsof ik dat doe, zelfs niet impliciet. Mijn punt is simpelweg dat, toegepast op Israël, Palestina en Gaza, het *jus ad bellum* een puinhoop is. Israëls oorlog tegen Hamas in Gaza is juridisch gezien geen uitgemaakte zaak. We hebben wel zulke duidelijke situaties – het is naar mijn mening redelijk duidelijk dat de VS en het VK agressie pleegden toen ze Irak binnenvielen in 2003, net zoals het nog duidelijker is dat Rusland agressie pleegde tegen Oekraïne. Maar Gaza is niet zo'n geval.

Ik wil nog twee argumenten naar voren brengen.

Ten eerste, velen die denken dat er één duidelijk correct antwoord is op de vraag of Israël recht heeft op zelfverdediging, doen dat simpelweg omdat het antwoord past bij hun eerdere verhalen en wereldbeelden. Ze vinden dat specifieke antwoord (ja, dat is het; nee, dat is het niet) prettig en *overduidelijk* correct, zelfs zo overduidelijk correct dat elk tegenargument, voor hen, alleen te kwader trouw kan worden aangevoerd. Sommige voorstanders van deze voor de hand liggende antwoorden handelen zelf te kwader trouw, omdat ze fanatieke aanhangers zijn van een van de partijen in het conflict of aandachtzoekende opportunisten, vooral in de beerputten van sociale media. Maar de meesten zijn dat niet. De meeste mensen met zeer uitgesproken meningen over deze vraag, die geloven dat er voor deze vraag (en voor anderen) voor de hand liggende antwoorden zijn, zijn goede mensen die te goeder trouw handelen. Hun denken wordt echter, om verschillende redenen, verdraaid door gemotiveerde redeneringen en bevestigingsbias, en dit leidt ertoe dat ze complexiteit vervangen door eenvoud. Dit is gewoon de menselijke natuur.

Voor alle duidelijkheid: ik beweer hier niet dat een soort perfecte objectiviteit mogelijk is, noch dat Israëlische of Palestijnse stemmen het niet verdienen om gehoord te worden omdat ze inherent niet objectief zijn. Ik beweer ook niet dat ik een toonbeeld van objectiviteit ben, die hier vrolijk pontificaal staat te pontificeren voor onze lezers. Net als iedereen lijd ik ook aan mijn eigen vooroordelen. Het enige wat ik zeg, is dat partijdigheid in het Israëlisch-Palestijnse conflict daar niet bij hoort, wat dat ook waard is. Noch Israël, noch Palestina zijn mijn stam, noch behoor ik tot een andere politieke, religieuze of ideologische stam. Het enige conflict dat me *echt* aan het hart gaat, is dat in voormalig Joegoslavië (hoewel dat waarschijnlijk minder wordt naarmate de tijd verstrijkt), op een manier die de pro-Palestijnse/pro-Israëlische stamleden vrijwel zeker niet aangaat. Maar juist de bittere ervaring van voormalig Joegoslavië, waar krankzinnig nationalisme en

parallelle realiteiten nog steeds welig tieren , heeft me gedeeltelijk ingeënt tegen het soort polarisatie dat Israël/Palestina zo gemakkelijk oproept – of dat wil ik tenminste graag geloven. Dit om zo duidelijk mogelijk uit te leggen waar ik vandaan kom.

Mijn tweede argument is dat het *jus ad bellum* zo complex, onzeker en omstreden is wat betreft Israël en Gaza dat het eigenlijk heel weinig nuttigs te zeggen heeft. Dit is een vreemde bekentenis voor een internationaal jurist. Maar er zijn problemen waarvoor het recht geen oplossingen heeft. Naar mijn mening is Israël/Gaza daar een van als het gaat om het *jus ad bellum* . Het internationaal recht biedt wel oplossingen als het gaat om het *jus in bello* , het recht van gewapende conflicten, maar de regels ervan zijn zeer contextueel, feitelijk en opereren over het algemeen op tactisch niveau. Ze gaan over het algemeen niet over het grote geheel. Het *jus ad bellum* daarentegen gaat wel over het grote geheel, maar zoals ik hieronder zal uitleggen, is de onbepaaldheid ervan zo groot dat het weinig nuttigs kan doen. Het internationaal recht zegt andere dingen heel duidelijk – dat Israël systematisch de mensenrechten van de Palestijnen schendt, dat het het Palestijnse volk de vrije uitoefening van hun recht op zelfbeschikking ontzegt, zodat ze hun eigen staat kunnen stichten, dat de voortzetting van de bezetting een schending van het zelfbeschikkingsrecht is, dat het bevorderen en beschermen van de activiteiten van kolonisten op de Westelijke Jordaanoever om meerdere redenen onwettig is, enzovoort. Maar het *jus ad bellum* biedt naar mijn mening simpelweg geen duidelijkheid over het huidige conflict in Gaza.

Morality and ethics, on the other hand, do in my view provide clearer answers. Morally, the only way in which Israel can justify its continuing military action in Gaza, with such horrible consequences for its civilian population, is by some kind of ‘lesser evil’ utilitarian calculus: if the lives of innocents it takes now serve the cause of saving more innocent lives in the future. With each passing day, with each dead baby in a Gazan hospital, that justification becomes more difficult to make. I, at least, fail to understand how the Israeli government can today reasonably claim that – speculatively, in the future – it will have saved more innocent lives than it has already taken.

But that’s morality, not the law (or it’s very debatable whether this is the law, as I will explain later), and I am very willing to listen to contrary views. Here, as I said, I want to examine the legal question of whether Israel has a right to self-defence, in response to the atrocity perpetrated by Hamas on 7 October. By self-defence I mean solely that notion as defined in Article 51 of the UN Charter, not some more open-ended political concept. The issue, in other words, is not whether Israel broadly speaking has the right to defend its own people (the core function of any state, any organized political community). Rather, the issue is whether, in conducting its military operation in Gaza, Israel is exercising its inherent right to self-defence within the meaning of Article 51, as bounded by the customary requirements of necessity and proportionality.

Having (hopefully) clarified the scope and nature of my task here, I will now proceed to examine the following points in turn:

- Self-defence applies only if the prohibition on the use of force is engaged, which depends, inter alia, on the statehood of Palestine
- Self-defence against Hamas if Palestine was a state or the prohibition on the use of force was otherwise engaged
- Self-defence against Hamas in occupied territory
- No self-defence against self-defence
- Different conceptions of *ad bellum* proportionality

Warning: this is a long post!

Self-defence applies only if the prohibition on the use of force is engaged

Let's start with this crucial point, one which Dapo and I examined on the blog regarding previous iterations of the Gaza conflict (see here and here). Self-defence is an *exception* to the prohibition on the use of force in Article 2(4) of the Charter. The exception does not apply *at all* if the prohibition itself is not engaged, and that prohibition is at least prima facie inter-state in nature. Consider the most obvious example, that of a state using force against rebels on its own territory. Even if thousands of people were killed in some kind of uprising, and the state sensibly decided that it needed to use armed force to defend itself, this would not be self-defence in the Article 51 sense. Rebels are not protected by the prohibition on the use of force in Article 2(4), which only applies in *international relations*, and the state doesn't need Article 51 to justify using force against them. Nor would its response be limited by necessity and proportionality as the *jus ad bellum* uses the terms. There is simply no *jus ad bellum internum*. Maybe there should be one, but there isn't one.

How is this relevant to Gaza? Because it is not obvious that the Article 2(4) prohibition is even engaged when Israel uses forces in Gaza, since the status of that territory is so uncertain. What *is* certain is that Hamas, the non-state armed group, is not as such either bound by, or protected by, Article 2(4). When Hamas uses force against Israel, or when Israel uses force against Hamas, Article 2(4) is just not applicable. Accordingly, without more, Article 51 does not apply either. Article 51 would apply only if, in order to use force against Hamas, Israel indirectly uses force against some entity that *was* protected by Article 2(4). Again, the exception to a prohibition cannot logically apply if the prohibition itself does not apply.

Imagine a scenario in which, in response to the 7 October attack, Israel only used force for a few days in order to kill Hamas fighters *on the territory of Israel itself*. This would not be self-defence in the meaning of Article 51 of the Charter, because the prohibition in Article 2(4) would not be engaged *at all* when Israel uses force against a non-state actor on its own territory. Or, imagine a scenario in which, in response to the 7 October attack, Israel destroyed a boat on the high seas, flying no state's flag, which was full of Hamas fighters. This would again not be self-defence in the meaning of Article 51 of the Charter, since the prohibition on the use of force is not engaged at all if Israel fires at such a vessel outside any state's territorial sea. Note that this is *not* the same question as

whether armed attacks in the sense of Article 51 can be committed by non-state actors (I will turn to it below). The point here is simply that Article 51 is not some kind of freestanding rule that can apply without Article 2(4).

So, what if Israel uses force against Hamas in the territory of Gaza? Do Articles 2(4) and 51 even apply? The answer to this question would clearly be yes only in one scenario – if Palestine already existed a state, and Gaza was its sovereign territory. The prohibition on the use of force would then apply between Israel and Palestine. Israel would need to rely on Article 51 not to justify using force against Hamas, but to justify using force on Palestine's territory without Palestine's consent. In other words, if Palestine was a state, the situation would be exactly the same as with, say, the 2006 war between Israel and Hezbollah in Lebanon, or with frequent Israeli strikes against Hezbollah now on the territory of Lebanon, or against other Iran-affiliated groups in the territory of Syria. In all of these cases Israel has been using force on the territory of other states without their permission, and could only potentially justify doing this on the basis of Article 51.

But, obviously, this raises the question of whether Palestine has achieved statehood. For most of the other states in the world, the answer is yes. For Israel and quite a few other states supporting it, the answer is no. There is legally no doubt whatsoever that the Palestinian people have the right to self-determination, which entails that there *ought to* be a state of Palestine. But there is doubt as to whether the *ought* has become an *is*, because the state of Palestine lacks the effectiveness criteria normally required to establish a new state. So, the basic dilemma here is whether the international community has, through collective action, such as the recognition of Palestine's non-member observer state status in the UN General Assembly, compensated for Palestine's deficits in other respects. This is again a question with no obvious answers, on which reasonable people can disagree, and which [also has implications elsewhere] – for my part I will only say that the case for Palestine's statehood is substantially stronger today than it was 15 years ago. The core difficulty, however, is that Israel, the state using force on Palestine's territory, doesn't recognize Palestine's statehood.

Another way out of this problem would be to argue that the Article 2(4) prohibition on the use of force protects self-determination units, not just states, and that Palestine is one such unit even if it has not yet attained statehood. That is an argument that is much more difficult to make, and I will leave it at that. There is no clear, generally accepted authority supporting this proposition. What is clear, however, is that Article 2(4) is not engaged simply because Israel is acting *outside its territory*. It would be engaged *only* if Israel, in using force, violated the sovereignty of some other state (see my ship on the high seas example above). I would respectfully disagree with Professor Mary Ellen O'Connell's [recent argument here on the blog] in that regard; the road to Article 51 and its limits goes through Article 2(4), and that prohibition exclusively (or near-exclusively) applies to states.

Bottom line: Article 51 self-defence would most likely be relevant only if we accepted that Palestine already is a state. Paradoxically, this means any formal invocation by Israel of self-defence when it uses force against Hamas could be taken as some kind of implicit recognition of the idea that the prohibition on the use of force is engaged, and that it

needs to justify breaching it – in some sense supporting the statehood of Palestine. If, however, Article 2(4) was not engaged, Article 51 would not apply at all. This doesn't mean that Israel would be *prohibited* from using any force against Hamas, just that the *jus ad bellum* would be irrelevant in assessing the legality of that use of force, which could only be judged based on the rules of IHL and human rights law. The position would be no different than if there was fighting between Israel and a non-state actor on Israeli territory.

Self-defence against non-state actors if the prohibition on the use of force was engaged

Let's assume the legally clearest situation, which is that Palestine has already achieved statehood. Any use of force by Israel on Palestine's territory without Palestine's permission would then need to be justified by relying on Article 51. The core problem here, as readers will be aware, is whether armed attacks in the sense of Article 51 can be committed by non-state actors. This is a question that has endlessly been discussed in the literature and here on the blog. I will not expound on it here in detail. Suffice it to say that states and scholars [are divided into two camps](). The first, restrictivist camp argues that, like Article 2(4), self-defence in Article 51 is purely inter-state in nature, and that only states can commit armed attacks. The second, expansionist camp argues that state practice has affirmed the position that self-defence can apply to armed attacks by non-state entities, as e.g. with the US use of force in Afghanistan after the 9/11 attacks by Al Qaeda.

I don't want to get into which of these two camps is today somehow the 'majority' position. Both views are entirely in the mainstream. [I am on the record]() as arguing that, as things stand, the *jus ad bellum* is indeterminate on the question of whether non-state actors, whose conduct is not attributable to a state, can commit armed attacks in the sense of Article 51 of the Charter, and I am happy to continue sitting on my fence on this point. What I think can fairly be said is that the expansionist camp has been gaining more traction in recent years. But the restrictivists are very much fighting back – recall how one of the reasons the United States gave for vetoing the first draft UN Security Council resolution on Gaza was precisely because the resolution didn't expressly affirm Israel's right to self-defence, which it didn't do precisely because many states on the Council were not comfortable with the idea that self-defence can, in law, apply to attacks by non-state actors.

Israel (and the United States) are, of course, firmly in the expansionist camp. If the position of that camp was taken as correct, then Israel would undoubtedly have the right to defend itself against Hamas on the territory of Palestine. If, however, the views of the restrictivist camp were taken as correct, then Israel could not use *any level of force* against Hamas in Gaza without Palestine's consent, unless it could be argued that the conduct of Hamas was attributable to Palestine. (Theoretically, this might be doable under the rule set out in Article 9 of the ILC Articles on State Responsibility.) Imagine a scenario in which, in response to the 7 October attack, Israel only conducted limited aerial strikes in Gaza against Hamas fighters, killing a few civilians incidentally, and conducted (very risky) targeted ground operations to rescue hostages. Even such a minimalist campaign

would be unlawful under the restrictivist argument in the absence of attribution – a position that I, as a matter of policy, find difficult to accept, but one which is legally more than tenable. See, in that regard, Mary Ellen's post I referred to above.

Self-defence against a non-state actor in occupied territory

This brings me to another problem. Arguments have been made in the literature, based partly on an ambiguous paragraph in the ICJ's *Wall* advisory opinion, that self-defence is inapplicable in situations of occupation. Imagine the following scenario: in Russian-occupied territories of Ukraine, Ukraine organizes a group of partisans who, on Ukraine's behalf, attack Russian armed forces. Would Russia have the right to self-defence here? No – that right simply doesn't apply, at least because Ukraine is the defending state and is trying to liberate its own territory, i.e. there is no self-defence against self-defence. The *jus ad bellum* has nothing to add here beyond the already clear position that Russia has violated Article 2(4).

But what if a group of partisans organized spontaneously, with no involvement by Ukraine and with Ukraine even disavowing them, and they attacked Russian forces – would self-defence apply then? And what if the partisans attacked Russian forces in Russian territory, rather than in occupied territory, but returned to the latter after their operations were over? Would Russia have the right to self-defence?

In this second scenario, my view is that the key point is whether the partisans, or some other non-state group, are acting on Ukraine's behalf or are not. If they are not, i.e. they are not conceivably exercising Ukraine's right to defend itself against Russia, then we'd be in a situation that's no different than the general problem of armed attacks by non-state actors. That Russia is already present in Ukraine *ad bellum* unlawfully doesn't change that analysis.

In sum, I doubt there is anything particularly special about the operation of self-defence in an occupied territory, although I acknowledge that there have been different views on this in the literature. Self-defence is an *ad bellum* category, occupation an *in bello* one, and it is unclear to me why there should be any direct link betweeen them. Even if some special considerations did apply, there remains the incredibly controversial issue of whether Gaza remains occupied by Israel, on which views again differ. And even so any inapplicability of self-defence to hostilities in an occupied territory would not entail a prohibition on the use of armed force – the only regulatory regime would be IHL.

No self-defence against self-defence

This brings me to the argument recently made on *Opinio Juris* by Dr Ralph Wilde. That argument is, well, a bit wild, especially because it is presented with such unshakeable certainty as to its correctness. I can't really do it justice here, but, as far as the *jus ad bellum* is concerned, it more or less boils down to the following sequence of propositions and conclusions:

1. Israel is engaging in a continuous armed attack in the sense of Article 51.

2. The 7 October operation by Hamas was a defensive action against the continuing Israeli armed attack. Dr Wilde accepts that the 7 October operation was a violation of the *jus in bello*. But nonetheless, he argues, Hamas' actions were still acts of *ad bellum* self-defence.
3. Therefore, because there can be no self-defence against self-defence, Israel's actions in Gaza are not self-defence and are ipso facto unlawful. QED.

Each of these points is highly problematic, even if we accepted *arguendo* much of Dr Wilde's preceding account as valid. On (1), note, dear reader, that Dr Wilde never actually tells us who the *victim* of this attack exactly is. Is it the state of Palestine (which if it exists would definitely be protected by the Article 2(4) prohibition on the use of force, and could also rely on Article 51 self-defence)? Or, is it the Palestinian people (where the applicability of Article 2(4), and consequently Article 51, is much more problematic, as I explained above)? Note, again, that there can be no armed attack by Israel if the prohibition on the use of force is not engaged at all vis-à-vis the alleged victim of the attack. Note also that Dr Wilde doesn't even mention the relevance of Palestine's (contested) statehood for any of these issues. Again, legally the clearest situation would be if the state of Palestine was already in existence, and on that basis Israel's continued occupation could conceivably amount to an armed attack against that state – but note all of the assumptions built into this.

On (2) Dr Wilde's argument really falls apart. Let's say there is already a state of Palestine, and that Israel's occupation of Palestine is an armed attack against it. But is Hamas acting on Palestine's behalf, so that it could exercise Palestine's Article 51 right to defend itself? The only representatives of the state of Palestine that seem to be acknowledged as such by the international community – the Palestinian Authority in the West Bank – are not exactly aligned with Hamas. Nor have they endorsed the 7 October operation. Alternatively, if there was no state of Palestine, would Hamas be acting on behalf of the Palestinian people, who somehow have an Article 51 right to defend themselves? Note how Dr Wilde talks about the Palestinian people right to resist the Israeli occupation, even by using force – something I am happy to accept in principle. But is that right to resistance *the same right* as self-defence in Article 51 of the Charter, which only speaks of attacks against members of the United Nations, i.e. states? And even if it was, how on Earth could one reasonably claim that Hamas is, in law, acting on behalf of the Palestinian people, and is thus exercising their right to self-defence? Hamas can call themselves the 'resistance' all they want, but there is only one internationally recognized representative of the Palestinian people, and that is the PLO.

This brings us to (3). Even if we accepted all of the propositions above as correct (and they are not), even if Hamas could somehow notionally be said to be defending the Palestinian people/Palestine, this does not entail that the 7 October action was an act of self-defence. Dr Wilde's argument is that *in bello* illegality, i.e. the fact that Hamas forces killed and brutalized civilians on 7 October, does not *ipso facto* change the qualification of Hamas' actions as *ad bellum* self-defence. He then offers us a couple of examples to support this claim, including one relating to Russia and Ukraine:

> Imagine, hypothetically, that Ukrainian resistance fighters launched attacks within Russia involving targeting civilians, indiscriminate attacks risking harm to civilians, and the taking of civilian hostages. These attacks would be illegal, but they would not mean that Russia would then be legally permitted to extend its illegal war in Ukraine, in order to neutralize the threat of further such attacks.

For what it's worth, it's true that, if we look at the long arc of a conflict, *in bello* violations alone do not necessarily mean that a state exercising its right to self-defence is no longer doing so. But that does not entail that *in bello* violations – or even acts that don't constitute violations of IHL at all – can't change the *ad bellum* character of a state's military actions, depending, in particular, on the purpose with which they are conducted. Consider, again, Ukraine and Russia. Imagine if Ukraine's counter-offensive was miraculously effective, and that Ukraine very quickly managed to liberate all Ukrainian territories (including Crimea) from Russia. Imagine if then the victorious Ukrainian army advanced on to Moscow, despite calls by Russia for a ceasefire and its abandonment of any territorial pretensions to Ukraine. There is no *in bello* violation here by Ukraine at all. That is not the relevant *ad bellum* question. The relevant *ad bellum* question is whether Ukraine's continuing armed response against Russia, even after Russia's total defeat, would comply with the necessity and proportionality criteria of self-defence. In the hypothetical I just gave, Ukraine's response, which started as self-defence against Russia, would eventually become an armed attack against Russia, and yes, Russia would suddenly possess the legal right to defend itself.

So, the real question for the Hamas actions on 7 October is not whether they were *in bello* violations (that much is obvious). The real question is whether those actions remained within the confines of *ad bellum* necessity and proportionality. Even if one accepted arguendo that Hamas was acting on behalf of Palestine/the Palestinian people, in defence against a continuing armed attack by Israel, how could one possibly accept that Hamas' actions on 7 October were compliant with the necessity and proportionality requirements of self-defence? The operation on 7 October not only killed far more Israeli civilians than soldiers, but the civilians were killed deliberately, rather than incidentally. The primary purpose of Hamas' actions was not to repel the ongoing Israeli attack against Palestine/Palestinians (however exactly defined), but to brutalize Israeli civilians and to capture many of them as hostages. The atrocity on 7 October cannot be characterised as an exercise of *ad bellum* self-defence because it *manifestly* had a punitive purpose, and could not even *conceivably* satisfy the necessity and proportionality criteria of self-defence. Had Hamas confined itself to killing Israeli soldiers, with a few civilians killed incidentally or even deliberately as an exception from the overall character of the operation, this assessment could be different. But, again, atrocity was the whole point of the operation. If you wanted a domestic law analogue, if somebody shot at me on a street, and I fired back at them, that would be self-defence. But if I then went to their house and killed their children, this would not be self-defence. The point hardly needs explaining, one would have thought.

So, just like in the victorious Ukraine example above, self-defence would no longer be a feasible characterization (if it ever was) of what Hamas was doing. Self-defence with a predominantly punitive purpose and/or which fails *ad bellum* necessity and proportionality is no longer self-defence, but becomes an attack. Whether Israel would have the right to defend itself against this attack depends on the considerations I examined above, and also on its own compliance with necessity and proportionality, to which I now turn.

Proportionality

Necessity and proportionality are the two customary limits on the right to self-defence, which are not expressly mentioned in Article 51. We only get to these criteria if (1) Palestine already was a state, or it was accepted that Article 2(4) protects self-determination units and that Gaza is part of such a unit; (2) we accepted that self-defence was available in response to armed attacks by non-state actors such as Hamas, or that the conduct of Hamas was somehow attributable to Palestine; (3) we also accepted that nothing in the *jus ad bellum* turns on the issue of whether Gaza remains occupied by Israel as a matter of the *jus in bello*; (4) we also accepted that Hamas was not exercising an Article 51 right to self-defence when it conducted its operation on 7 October. If all of these conditions are met, Israel would be exercising its right to self-defence by using force against Hamas in Gaza, and necessity and proportionality would set the limits on such a use of force. An Israeli response to 7 October that exceeded necessity and proportionality would itself become an attack, again to the extent that *jus ad bellum* applies in the first place.

The basic problem here, however, is that there are at least three ways of thinking about *ad bellum*, self-defence proportionality – the best scholarly exploration of this issue remains Professor [David Kretzmer's seminal 2013 article in the EJIL](). The first conception of proportionality is tit-for-tat – a response in self-defence is proportionate so long as it is broadly similar in scale and effects to the attack. On this approach Israel's response to the 7 October attack would be clearly disproportionate, as it has killed more than eight times as many Palestinians as the number of Israelis who died on 7 October. But, while states have used some variant of tit-for-tat proportionality when it comes to low-scale attacks and responses, essentially to limit risk of further escalation, this type of proportionality has generally not found state support for anything resembling the scale of the 7 October attack.

The second type of proportionality is ends-means proportionality. This is simply the idea that a use of force in self-defence is justified only as a last resort, *no more than is necessary* to do so. The key problem here is in defining the permissible goal, i.e. what is necessary. The moment one accepts Israel's contention that the only way it could be secure is to destroy the capability of Hamas to attack Israel, it becomes very difficult to argue that Israel has exceeded the bounds of necessity. Missile strikes by Hamas continue and the hostages remain in its custody despite all the military force that Israel has already used. Israel can therefore argue that its continuing campaign remains necessary, since its goals are yet to be achieved – compare this to the hypothetical example given above of Ukraine actually succeeding in kicking Russia out of its territory,

which would mean that any further military action would no longer be necessary. Thus, it is only if Israel's goal of removing Hamas from power in Gaza is per se regarded as impermissible – and I'm not sure on what basis it could be so regarded, especially with Hamas leaders vowing that they would repeat the 7 October attack if they could – that ends-means proportionality could do any useful work in limiting Israel's actions.

The third conception of proportionality – which Kretzmer called 'narrow' proportionality, and could also be termed proportionality *stricto sensu* – is very different. It would require a defender to strike a balance between the (possible) benefit gained by using force and the (actual) harm caused by it. In this particular context, Israel would need to demonstrate that its military campaign in Gaza is saving more lives *in the long run* than the lives it is taking *right now*.

This is the kind of proportionality that we need, that could do the real work here. I agree in that regard entirely with [Adil Haque's perceptive post on *Just Security*] – as I noted above, with every day that goes by it becomes more difficult for Israel to argue that it is *speculatively* saving more lives in the future than it is *certainly* taking in the present. Israel can take many other measures to reduce the risk of Hamas doing again anything remotely approaching 7 October, that would not have as their consequence the continuing devastation of Gaza. I also don't see how this balancing exercise could treat the value of Palestinian lives any differently from that of Israeli lives; if anything, the value of a life taken now means more than the value of a life that is perhaps saved in the future. While I am open to hearing any contrary argument, I don't see how ethically the continuing loss of civilian life in Gaza can be justified, even if that loss is incidental rather than deliberate.

Legally, however, the critical problem is that states (and scholars) have not unambiguously endorsed this third, balancing conception of proportionality in the law of self-defence. Many leading experts of the *jus ad bellum* deny that this type of proportionality, even if morally required, is also required legally (cf. Rule 72 of the Tallinn Manual 2.0, with the International Group of Experts not even noting the *possibility* that this type of proportionality is required). I certainly know what the law *should* be in this regard, but it is difficult to make the argument that the law already *is* where it should be.

Conclusion

Whether Israel has an Article 51 right to self-defence is a complicated question that does not allow for binary answers. All possible answers turn on various underlying assumptions:

1. If Palestine is not already a state, and there is no other option of extending the Article 2(4) prohibition on the use of force to Gaza, then Israel does *not* have a right to self-defence. This does not mean that Israel cannot use force in Gaza at all, but that the *jus ad bellum* would impose no constraints on it. I have no idea whether this would be the official view of the Israeli government. On the one hand, it is the most permissive in the *ad bellum* sense and aligns with Israel's views on the statehood of Palestine, but, on the other hand, it would require Israel not to use the language of self-defence.
2. If Palestine already is a state, or the prohibition on the use of force is somehow otherwise engaged, then Israel would have the right to self-defence if it were accepted that non-state actors such as Hamas are capable of committing armed attacks in the sense of Article 51 of the Charter, and that the operation on 7 October was one such attack. However, states and scholars remain divided on the core question of principle, although there has certainly been a growing trend of recognizing that non-state actors can commit armed attacks. Alternatively, Israel could even under a restrictivist view have the right to self-defence if the actions of Hamas were attributable to the state of Palestine, but any such attribution would be difficult.
3. If the prohibition on the use of force was engaged, and Israel did not have the right to self-defence because none of the options in (2) was operable, then Israel could take no military action in Gaza whatsoever, no matter how limited, not even for the purpose of rescuing the hostages.
4. If Israel did have the right to self-defence because one of the options in (2) was operable, its response would be limited by the necessity and proportionality criteria of customary international law. However, how precisely proportionality operates in these circumstances is highly contested, and Israel certainly has a plausible way of arguing that its actions remain proportionate, regardless of the number of Gazan civilians killed.

The combined effect of all of this uncertainty is such, in my view, that the *jus ad bellum* is of very little practical use with regard to the war in Gaza. Put differently, this is one of those cases in which the law runs out (leaving IHL aside for the moment, whose importance remains crucial, but which is structurally biased in favour of military necessity). This is one of those cases in which lawyers should not overly emphasise the law's relevance or importance. This is one of those cases in which, in my view, ethics provides a clearer answer than the law. Morally, Israel can only justify taking the lives of innocents by saying that doing so would save more lives in the future. And the burden is on Israel to show that, even if it is not killing civilians intentionally, it is somehow still acting in such a way that will save more lives in the long run. This is not a burden that, in my judgment at least, Israel has so far met or is likely to meet. When confronted with this moral question, whether Israel has the right to self-defence under Article 51 of the Charter is largely beside the point.